

# INTERNATIONAL ECONOMIC LAW

## I. BILATERAL AND PLURILATERAL TRADE

Having an open economy,<sup>1</sup> it is the stated aim of the New Zealand Government to open up markets overseas for New Zealand businesses,<sup>2</sup> and in the year under review, it was very active in this regard. In particular, the negotiation of the Trans-Pacific Partnership (TPP), the biggest trade deal ever brokered by New Zealand, took centre stage in 2015.

### A. *Trans-Pacific Partnership Agreement*

#### 1. Conclusion of Negotiations

New Zealand had a vested interest in the conclusion of the TPP, having initiated this trading bloc, which comprises the Association of Southeast Asian Nations (ASEAN) members Brunei Darussalam, Malaysia, Singapore and Viet Nam, all the NAFTA members (Canada, United States, Mexico), the Latin-American countries of Peru and Chile, as well as New Zealand, Australia and Japan. Taken together, the TPP market makes up 36.2% of world GDP.<sup>3</sup> The TPP will constitute a free-trade area within the meaning of art XXIV of the General Agreement on Tariffs and Trade (GATT) and is linked to the WTO system via art XXIV of the GATT and art V of the General Agreement on Trade in Services (GATS). However, the TPP is not just about trade, but also encompasses investment protection. Key stumbling blocks during negotiations were inter alia the chapters on the protection of intellectual property (IP) and foreign investments.<sup>4</sup> As regards IP, New Zealand has a mixed approach, as it is both an importer and exporter of IP-intensive products.<sup>5</sup> With respect to medicaments, however, New Zealand is an importer,<sup>6</sup> so it is feared that longer terms of protection for pharmaceutical patents will lead to increased health costs in New Zealand. As regards foreign investment, the envisaged investor-state dispute settlement (ISDS) clause is particularly disputed. In this respect the concern is voiced that the threat of litigation instituted against New Zealand by foreign investors (and the ensuing obligation to pay compensation if the case is lost) occasions a regulatory chill in policy areas of public interest, such as health and environmental protection.<sup>7</sup> New Zealand already has such a clause in relation to Chinese<sup>8</sup> and Taiwanese investors.<sup>9</sup> Besides, the ASEAN-Australia-New Zealand

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<sup>1</sup> World Trade Organization *Trade Policy Review: New Zealand* WT/TPR/S/316, 11 May 2015 (Report by the Secretariat) at 6.

<sup>2</sup> NZ Ministry of Foreign Affairs and Trade [MFAT] *Strategic Intentions 2015-2019* (2015) at 9.

<sup>3</sup> Australian Department of Foreign Affairs and Trade [DFAT] “Trans-Pacific Partnership Agreement” <<http://dfat.gov.au>>.

<sup>4</sup> MFAT “TPP Leaders and Ministers meet in Beijing” (11 November 2014) TPP Talk <<https://www.mfat.govt.nz>>.

<sup>5</sup> NZ Treasury “Composition of Merchandise Exports and Imports” (6 April 2016) New Zealand Economic and Financial Overview 2016 <<http://www.treasury.govt.nz>>.

<sup>6</sup> NZ Treasury, above n 5, at table 13.

<sup>7</sup> It’s Our Future “TPPA’s Effect On The New Zealand Environment” (27 June 2015) <<https://itsourfuture.org.nz>>.

<sup>8</sup> Free Trade Agreement between the Government of New Zealand and the Government of the People’s Republic of China, art 153 [NZ-China FTA].

Free Trade Agreement (AANZFTA) contains an ISDS clause in art 21. In addition, the free trade agreement (FTA) with South Korea has ISDS.<sup>10</sup> While New Zealand has never been sued by a foreign investor to date, the TPP would grant legal standing to US companies vis-à-vis New Zealand for the first time.

On 5 October 2015, seven years after the negotiations on the TPP began, they were successfully completed in Atlanta.<sup>11</sup> Better market access for dairy products, New Zealand's number one negotiation objective,<sup>12</sup> was only partly achieved. Still, becoming an original member of the TPP is expedient in light of the fact that joining later is likely to entail additional concessions by the acceding state ("terms and conditions"), such as those required of China when acceding to the WTO.<sup>13</sup> Moreover, for a relatively small economy like New Zealand the pursuit of bilateral agreements with such big players as Japan or the United States would have been likely to come at a bigger cost than the plurilateral approach taken under the TPP.

## 2. Conformity with the Treaty of Waitangi

Of overarching concern is the compatibility of the ever closer net of international trade and investment regulation with the Treaty of Waitangi.<sup>14</sup> In June 2015 a case was brought before the Waitangi Tribunal on the conformity of the TPP with the principles of the Treaty of Waitangi.<sup>15</sup> To make sure that the New Zealand Government lives up to its obligations arising from the Treaty of Waitangi and has, for instance, the latitude to treat Māori businesses more favourably than overseas businesses, the Government routinely incorporates an exception clause to this effect in its free trade agreements.<sup>16</sup> The broad scope of the TPP will put this exception clause to the test, making a conflict more likely.

The exception clause is subject to the doctrine of *abus de droit*.<sup>17</sup> By way of example, art 205(1) of the New Zealand-China FTA stipulates as follows:

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

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<sup>9</sup> Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation, art 20 [NZ-Taiwan Economic Cooperation Agreement].

<sup>10</sup> NZ-Taiwan Economic Cooperation Agreement, art 10.20.

<sup>11</sup> For a summary of the negotiation history, see Organization of American States "Trans Pacific Partnership Agreement (TPP)" Foreign Trade Information System <<http://www.sice.oas.org>>.

<sup>12</sup> MFAT *Annual Report 2014-15* (A.1. AR, 2015) at 16.

<sup>13</sup> *Accession of the People's Republic of China* WT/L/432, 23 November 2001 (Decision of the Ministerial Conference).

<sup>14</sup> Carwyn Jones and others "Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement" TPP Legal <<https://tpplegal.wordpress.com/>>.

<sup>15</sup> Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2015).

<sup>16</sup> See, eg, New Zealand-Singapore Closer Economic Partnership, art 74; New Zealand-Thailand Closer Economic Partnership, art 15.8; Trans-Pacific Strategic Economic Partnership, art 19.5 [P4 Agreement].

<sup>17</sup> See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 6 November 1998 (Report of the Appellate Body) at [158].

According to paragraph 2 of this Article, the interpretation of the Treaty of Waitangi is not actionable. That is, it is up to New Zealand law to ultimately delineate the scope of the exception, thus giving the New Zealand Government ample discretion (eg as to the determination of a Māori business). The recently concluded New Zealand-Korea Free Trade Agreement contains the same provision.<sup>18</sup> The Treaty of Waitangi exception clause is broader than the Annex exemption used by Australia, eg in its Schedule of Non-conforming Measures to the China-Australia FTA,<sup>19</sup> which is limited to trade in services and investment.

### *B. New Zealand-Korea Free Trade Agreement*

Another major achievement in the trade arena was the signing of a trade deal with South Korea in Seoul on 23 March 2015. The New Zealand-Korea FTA entered into force on 20 December 2015. South Korea is New Zealand's seventh largest trading partner, meaning that New Zealand has now concluded free trade agreements with all its top ten trading partners apart from the European Union.<sup>20</sup> As seen in the case of the TPP, the areas of international trade and investment are assimilating, and the treaty practice of the New Zealand Government forms no exception in this regard. In line with this, the trade deal with South Korea is but one example of a "deep" agreement, covering subject matters such as investment<sup>21</sup> and government procurement,<sup>22</sup> labour and environment,<sup>23</sup> anti-trust rules<sup>24</sup> and rules on regulatory cooperation.<sup>25</sup> The national treatment obligation in the investment chapter goes further than the one in the New Zealand-China FTA and includes the pre-entry phase. Unlike art 10.5 of the New Zealand-Korea FTA, the national treatment obligation in the New Zealand-China FTA does not contain a reference to the "establishment" and "acquisition" of investments.<sup>26</sup> The chapters on labour and the environment recognise the linkages between labour and environmental standards on the one hand, and competitive advantages on the other.<sup>27</sup> In doing so, they seek to ensure a minimum standard,<sup>28</sup> pre-empting a race to the bottom of those standards.<sup>29</sup>

Of importance to iwi is the proviso in the IP chapter for the protection of traditional knowledge and folklore in accordance with international obligations.<sup>30</sup> Such an obligation is currently being negotiated under the aegis of the World Intellectual Property Organization.<sup>31</sup>

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<sup>18</sup> Free Trade Agreement between New Zealand and the Republic of Korea, art 20.6 [NZ-Korea FTA].

<sup>19</sup> Section B 2, 9.

<sup>20</sup> NZ Ministry of Business, Innovation & Employment "Economic overview" (1 February 2016) New Zealand Now <<https://www.newzealandnow.govt.nz>>.

<sup>21</sup> Chapter 10.

<sup>22</sup> Chapter 13.

<sup>23</sup> Chapters 15 and 16.

<sup>24</sup> Chapter 12.

<sup>25</sup> Passim.

<sup>26</sup> NZ-China FTA, art 138.

<sup>27</sup> NZ-Korea FTA, arts 15.2.3–5 and 16.2.4–6.

<sup>28</sup> NZ-Korea FTA, arts 15.2.1 and 16.2.1, 3.

<sup>29</sup> NZ-Korea FTA, arts 15.1 and 16.1.

<sup>30</sup> NZ-Korea FTA, art 11.10.

<sup>31</sup> World Intellectual Property Organization "Intergovernmental Committee (IGC)" <<http://www.wipo.int/tk/en/igc/>>.

### *C. Other Free Trade Agreements*

Work on a Single Economic Market with Australia is ongoing,<sup>32</sup> as are negotiations on a Regional Comprehensive Economic Partnership (RCEP) with all ten ASEAN members and five other key trading partners (Australia, China, India, Japan, Korea). Given that ASEAN already has free trade agreements with all these countries, including New Zealand, progress has been made to consolidate the existing agreements and the final text could be ready for signing as early as the end of 2016.<sup>33</sup> RCEP, like the TPP, falls under the category of mega-regional trade and investment agreement, comprising almost half of the world's population and 30% of world GDP.<sup>34</sup>

Interestingly, negotiations on investment liberalisation proceed on a negative list approach.<sup>35</sup> This means that everything is liberalised apart from sectors explicitly inscribed in a list. This usually leads to further liberalisation than a positive list approach.

In parallel to RCEP, New Zealand is negotiating a bilateral free trade agreement with India. Whether the several layers of bilateral, regional and multilateral trade and investment regulation lead to a clash of jurisdictions and how to address that is a moot point.<sup>36</sup> The straightforward solution would be to have the regional agreement supersede the bilateral ones.<sup>37</sup> This is what happened in the case of the North-American Free Trade Agreement (NAFTA), which supersedes the Canada-United States FTA.<sup>38</sup> Should the TPP enter into force, New Zealand businesses will be able to invoke four agreements in relation to, for example, Singapore (the ASEAN-Australia-New Zealand FTA, the P4 Agreement, the bilateral agreement and the TPP), potentially leading to higher transaction costs.

On 29 October 2015 New Zealand and the European Union both expressed their principal willingness to commence negotiations on “a deep and comprehensive high-quality Free Trade Agreement.”<sup>39</sup> The European Union is New Zealand's third most important trading partner.<sup>40</sup> Trade with the EU is more substantial both with regard to exports and imports than trade with the US, and is only surpassed by trade with Australia and China.<sup>41</sup> Given that New Zealand is one of the few WTO Members with which the EU does not yet have a free trade agreement New Zealand businesses are currently at a disadvantage in the European market. Because New Zealand is only the EU's 50th largest trade in goods partner,<sup>42</sup> New Zealand has a greater stake in the negotiations than the EU.

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<sup>32</sup> MFAT “Single Economic Market” <<https://www.mfat.govt.nz>>.

<sup>33</sup> John Anthony “NZ hosts talks for RCEP trade deal which could ‘dwarf’ TPPA” (13 June 2016) stuff <<http://www.stuff.co.nz>>.

<sup>34</sup> DFAT “Regional Comprehensive Economic Partnership” <<http://dfat.gov.au>>.

<sup>35</sup> MFAT “Regional Comprehensive Economic Partnership (RCEP)” <<https://www.mfat.govt.nz>>.

<sup>36</sup> Hugh Goodwin “Jurisdictional Headache: Finding a Solution to the Layers of Trade Governance between New Zealand and China” (2014) 12 NZYIL 29.

<sup>37</sup> This is the solution of the Canada-EU Comprehensive Economic and Trade Agreement, art 30.8.1.

<sup>38</sup> Global Affairs Canada “Canada-United States Free Trade Agreement (FTA)” (19 May 2016) <<http://www.international.gc.ca>>.

<sup>39</sup> European Commission “Statement of the Presidents of the European Council and the European Commission and the New Zealand Prime Minister” (press release, 29 October 2015).

<sup>40</sup> MFAT “New Zealand-European Union FTA” <<https://www.mfat.govt.nz>>.

<sup>41</sup> NZ Ministry of Business, Innovation & Employment, above n 20.

<sup>42</sup> European Commission “New Zealand” (29 April 2016) Trade <<http://ec.europa.eu/trade/>>.

The First Protocol to AANZFTA entered into force for New Zealand on 1 October 2015.<sup>43</sup> According to its preamble, the objective is to make certificates of origin “more trade facilitative” by removing some information requirements, such as “the requirement to reflect the FOB value ... in cases where the regional value content criteria is not used”.<sup>44</sup>

The trade talks with Russia on a free trade agreement are still suspended following the annexation of the Crimea by Russia.<sup>45</sup> The New Zealand-Gulf Cooperation Council FTA is negotiated but still not ratified.<sup>46</sup> Talks on PACER Plus, an economic integration agreement for the Pacific region, continue.<sup>47</sup>

## II. WORLD TRADE ORGANIZATION

Trade relations with countries who New Zealand has not (yet) concluded a free trade agreement with are governed by the World Trade Organization (WTO) at a most-favoured-nation (MFN) level, the international liberalisation minimum. In 2015 New Zealand’s trade policy was due to be reviewed by the WTO for the fifth time under its Trade Policy Review Mechanism.<sup>48</sup>

### A. Agreements

New Zealand acceded to the revised Government Procurement Agreement (GPA) on 13 July 2015. Being a plurilateral WTO agreement, special ratification was necessary.<sup>49</sup> Since 12 August 2015, New Zealand businesses have access to a public procurement market estimated to be worth USD 1.7 trillion in government contracts annually.<sup>50</sup> According to the WTO, the public procurement market averages 10-15 per cent of the GDP of an economy.<sup>51</sup>

Furthermore, New Zealand ratified the Trade Facilitation Agreement (TFA) on 29 September 2015.<sup>52</sup> Once in force,<sup>53</sup> it will expedite “the movement, release and clearance of goods, including goods in transit”.<sup>54</sup> Aside from the TFA, which was an outcome of the Bali Ministerial Conference in 2013, the Doha Round remains in a deadlock.

Negotiations towards a plurilateral Trade in Services Agreement (TiSA), building upon GATS, continued. Its successful conclusion is a priority, considering that the services sector accounts for 70 per cent of employment in New Zealand.<sup>55</sup>

New Zealand, together with 52 other WTO Members, agreed to expand the scope of the Information Technology Agreement (ITA) at the Nairobi Ministerial Conference in December 2015, so as to include an additional 201 products. These are valued by the WTO at

<sup>43</sup> MFAT “AANZFTA First Protocol” <<https://www.mfat.govt.nz>>.

<sup>44</sup> Recital 4.

<sup>45</sup> MFAT “Russia” <<https://www.mfat.govt.nz>>.

<sup>46</sup> MFAT “NZ-Gulf Cooperation Council FTA” <<https://www.mfat.govt.nz>>.

<sup>47</sup> MFAT “PACER Plus” <<https://www.mfat.govt.nz>>.

<sup>48</sup> WTO “Trade Policy Review: New Zealand” (29 June and 1 July 2015) <<https://www.wto.org>>.

<sup>49</sup> Marrakesh Agreement Establishing the World Trade Organization, arts II:3, XII:3 [WTO Agreement].

<sup>50</sup> WTO *Annual Report 2016* at 97.

<sup>51</sup> WTO “WTO and government procurement” (2016) <<https://www.wto.org>>.

<sup>52</sup> WTO “Ratifications list” (1 June 2016) Trade Facilitation Agreement Facility <<http://www.tfafacility.org>>.

<sup>53</sup> This will be the case when two-thirds of the Members have accepted it, WTO Agreement, art X:3.

<sup>54</sup> Agreement on Trade Facilitation, preamble, recital 3.

<sup>55</sup> MFAT “Trade in Services Agreement (TiSA)” <<https://www.mfat.govt.nz>>.



over USD 1.3 trillion per year.<sup>56</sup> The objective of the ITA is to eliminate all customs duties on covered information technology products.<sup>57</sup> Another outcome of the “Nairobi Package” was the abolishment of all agricultural export subsidies.<sup>58</sup>

Negotiations on an Environmental Goods Agreement, which aims to liberalise trade in all environmental goods (eg wind turbines) and services (eg waste water management), continued.<sup>59</sup> Once this plurilateral agreement enters into force, the MFN principle will apply so that all WTO Members may benefit from the resultant reduction of trade barriers.<sup>60</sup>

## *B. Dispute Settlement*

### *1. New Zealand as a Complainant*

A panel was constituted in the *Indonesia – Import Licensing Regimes* case, in which the United States is a co-complainant.<sup>61</sup> The measure at issue is Indonesia’s import licensing systems with respect to horticultural products, animals and animal products. New Zealand alleges a violation of inter alia the general prohibition of quantitative restrictions in art XI:1 GATT, the national treatment obligation in art III:4 GATT and the Import Licensing Agreement.<sup>62</sup> The panel in *Korea – Beef* stated that:

when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT ... would necessarily constitute a violation of Article 4.2 of the Agreement on Agriculture ...<sup>63</sup>

New Zealand’s chances of success in this case hinge on whether the panel will accept Indonesia’s defence that the impugned import licensing systems form part of a broader policy to ensure food security, that Indonesia lacks the necessary freezing facilities at its ports of entry and that New Zealand cannot guarantee that the meat exported to Indonesia is halal, that is, acceptable according to Muslim law. As a result of Indonesia’s measures, beef exports from New Zealand have gone down by 80 per cent.<sup>64</sup> That said, the panel ruling will not only be of commercial interest but also of systemic importance as it is likely to clarify some provisions of the Import Licensing Agreement, such as the meaning of “no more administratively burdensome than absolutely necessary” in art 3.2.

<sup>56</sup> WTO “Information Technology Agreement” (2016) <<https://www.wto.org>>.

<sup>57</sup> *Ministerial Declaration on Trade in Information Technology Products* WT/MIN(96)/16, 13 December 1996.

<sup>58</sup> WTO “Nairobi Package” (2015) <<https://www.wto.org>>.

<sup>59</sup> MFAT “Environmental Goods Agreement (EGA)” <<https://www.mfat.govt.nz>>.

<sup>60</sup> European External Action Service “Joint Statement Regarding the Launch of the Environmental Goods Agreement Negotiations” (press release, 8 July 2014).

<sup>61</sup> *Indonesia – Importation of Horticultural Products, Animals and Animal Products* WT/DS477/10, WT/DS478/10, 9 October 2015 (Constitution of the Panel).

<sup>62</sup> *Indonesia – Importation of Horticultural Products, Animals and Animal Products* WT/DS477/9, 24 March 2015 (Request for the Establishment of a Panel by New Zealand).

<sup>63</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/R, WT/DS169/R, 10 January 2001 (Report of the Panel) at [762].

<sup>64</sup> See *Indonesia – Importation of Horticultural Products, Animals and Animal Products* WT/DS466/1, G/L/1038, G/AG/GEN/113, G/LIC/D/46, G/PSI/D/2, 9 September 2013 (Request for Consultations by New Zealand) at 2.

## 2. New Zealand as a Third Party

New Zealand has been an active third party within the meaning of art 10 of the Dispute Settlement Understanding in the past. Thus, it reserved third party rights in *Korea – Radionuclides (Japan)*<sup>65</sup> and *Indonesia – Chicken*.<sup>66</sup> *Korea – Radionuclides* concerns food safety measures enacted in the wake of the Fukushima disaster and *Indonesia – Chicken* is about import restrictions for chicken meat and chicken products. Another case in which New Zealand had secured its third party rights, *Tobacco Plain Packaging*, was still ongoing in 2015.<sup>67</sup> New Zealand was also a third party in the art 21.5 proceedings of *US – Tuna II* and *US – COOL*, both decided in 2015.<sup>68</sup>

### C. Domestic Application

The Ministry of Business, Innovation & Employment completed three anti-dumping investigations in 2015, leading to the imposition of anti-dumping duties.<sup>69</sup> In two cases concerning canned peaches from Greece and galvanised wire from Malaysia, anti-dumping duties still apply.

## III. OTHER ECONOMIC AGREEMENTS

### A. International Tax

A double tax agreement with Samoa entered into force on 23 December 2015 and a revised double tax agreement with Canada entered into force on 26 June 2015.<sup>70</sup> Such agreements are negotiated with a view to, inter alia, avoiding double taxation. A Tax information exchange agreement with the Marshall Islands entered into force on 9 April 2015.<sup>71</sup>

### B. Air Services Agreements

New Zealand signed air services agreements with Kuwait (23 October 2015), Uruguay (30 September 2015), Qatar (9 September 2015), Cambodia (19 August 2015) and Greece (28 May 2015). An air services agreement with Seychelles entered into force on 29 September 2015. The air services agreements with the United Arab Emirates, Viet Nam, France and Switzerland were updated.

<sup>65</sup> WTO “Korea – Import Bans, and Testing and Certification Requirements for Radionuclides” (2016) <<https://www.wto.org>>.

<sup>66</sup> WTO “Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products” (2016) <<https://www.wto.org>>.

<sup>67</sup> *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS434, WT/DS435, WT/DS441, WT/DS458, WT/DS467.

<sup>68</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico* WT/DS381/AB/RW, 20 November 2015 (Report of the Appellate Body); *United States – Certain Country of Origin Labelling (COOL) Requirements, Recourse to Article 21.5 of the DSU by Canada and Mexico* WT/DS384/AB/RW, WT/DS386/AB/RW, 29 May 2015 (Report of the Appellate Body).

<sup>69</sup> NZ Ministry of Business, Innovation & Employment “Completed investigations” (24 December 2015) <<http://www.mbie.govt.nz>>.

<sup>70</sup> NZ Inland Revenue “Tax treaties” <<http://taxpolicy.ird.govt.nz>>.

<sup>71</sup> NZ Inland Revenue “Tax treaties” <<http://taxpolicy.ird.govt.nz>>.

### *C. Asian Infrastructure Investment Bank*

New Zealand is one of the founding members of the Asian Infrastructure Investment Bank, a multilateral development bank to fund infrastructure projects in Asia so as to increase regional connectivity.<sup>72</sup> The Bank started operating on 25 December 2015.

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<sup>72</sup> MFAT, above n 12, at 17; Asian Infrastructure Investment Bank <<http://www.aiib.org/>>.